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In the

Supreme Court of the United States

OCTOBER TERM, 1979

ROBERT L. PRESTON, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No.

ROBERT L. PRESTON, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Robert L. Preston, et al.,[1] petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a, *infra*) is reported at 596 F.2d 232. The opinion of the District Court for the Western District of Wisconsin (App. 16a, *infra*) is not reported.

[1] Petitioners are Robert L. Preston; Merwin Abrahamson; Arnold B. Anderson; Edward Lavern Anderson, as personal representative of the estate of Mary Anderson, deceased; Robert Antes; Ardlin Farms, Inc.; David Black; Kenneth Bohnhoff; Elmer Braun; Rodney Brickson; Robert F. Brunsell; Wilbert Christen, Jr.; Dennis Collins; Donald Collins; Dorothy Collins; Russell Cousin;

JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 1979. Jurisdiction in this Court is predicated upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The Commodity Credit Corporation, in aid of the national agricultural price support program, makes nonrecourse loans to farmers, collateralized by their grain, provided that the grain is deposited in one of the warehouses which have been approved by the Commodity Credit Corporation as a safe place in which to store grain. In order to make certain that the warehouses continue to be safe places in which to store grain, Agricultural Marketing Service, another agency of the United States

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([1] Continued)
Douglas Cullen; Kenneth Diehls; Cecile L. Disch, individually and as surviving joint tenant with Henry C. Disch, deceased; Roger Eicher; Clifton Elmer; Clifford R. Fellows; Alvin Francis; Edwin Gretebeck; Alice Haakenson; Chester Haakenson; Morris R. Haakenson; Burdette Haas; Hilman Halverson; Sigrid Hansen, as sole heir of the estate of Paul Hansen, deceased; David Harrington; Duane Helland; Norman Johnson; Robert E. Jorgenson; Virgil Klitzman; Malcolm G. Kruckenberg; Norman Krumweide; Clarence Laird; James M. Lunde; Olaf Lunde; Willis Martin; Edward J. Marty; William J. Mulligan; James Murray; Richard Nelson; Clarence Ostrander; Spencer Porter; Philip Porterfield; Gary W. Preston; Orpha P. Price; Robert Ritter; Donald A. Robb; Dave Rowley; J. Marty Rowley; Arnold Rupnow; Richard Schneider; Alan Sorenson; Jack Strickland; Kenneth P. Templeton; James L. Thompson; Oyvind J. Wikum; Harold Wyrick; Letha B. Zee, as personal representative of the estate of Paul R. Zee, deceased; Edwin Zeich, as administrator of the estate of Richard Schultz, deceased; Frederick Zurfluh; John Zurfluh; and William Zurfluh.

Department of Agriculture, in cooperation with the Commodity Credit Corporation, regularly audits CCC-approved warehouses.

I.

Is a claim that the United States negligently, and later intentionally, failed to warn that conditions were not safe a claim within the "misrepresentation" exclusion of the Federal Tort Claims Act, 28 U.S.C. § 2680(h), because the failure to warn carried with it an implication that conditions were safe?

II.

Does the United States owe a duty to farmers who are encouraged to do and do business with a CCC-approved commercial warehouse, to exercise reasonable care in ascertaining whether the warehouse is a safe place in which to store grain and to warn them if it is not?

STATUTE INVOLVED

The statute involved is the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, particularly § 2680(h). The full text of the statute appears in the appendix at page 19a *et seq.*

STATEMENT OF THE CASE

The District Court granted the motion of the United States to dismiss the complaint, holding that it failed to state a claim under the Federal Tort Claims Act, on the ground that the claim was one for "misrepresentation or deceit" expressly excluded by 28 U.S.C. § 2680(h), and further, that the United States owed petitioners no actionable duty.

The United States Court of Appeals for the Seventh Circuit affirmed the dismissal of that part of the com-

plaint which sought damages for the alleged negligent failure of the United States to warn prior to November 1972 and its intentional failure to warn beginning in November 1972 on the ground that "the alleged tort was the implied misrepresentation that the warehouse was safe" (App. 12a), relying principally upon *United States* v. *Neustadt,* 366 U.S. 696. It did not pass on the question whether the United States owed petitioners a duty. It reversed and remanded with respect to the dismissal of that part of the complaint, not discussed by the District Court, which sought, in the alternative, an accounting for grain of the petitioners converted by the United States beginning in November 1972.

The allegations of the forty-four page complaint are summarized below:

In 1957, Benjamin T. Green secured a license from the Wisconsin Department of Agriculture for Grain Finance to operate a public warehouse in Evansville, Wisconsin. In December, 1965, Green secured a similar license for Farmers Grain Exchange ("FGX") to operate a public warehouse at the same location as the Grain Finance warehouse. Green thereafter stored grain of farmers in the Evansville area at that warehouse and issued warehouse receipts in the names of Grain Finance and FGX, commingling all of the grain stored by Grain Finance with all of the grain stored by FGX.

Shortly before July 1, 1969, Green obtained the approval of the Commodity Credit Corporation of the warehouse facility utilized by Grain Finance as a depository of grain owned by CCC or acquired by CCC in the warehouse as a result of its loans to farmers, and entered into a Uniform Grain Storage Agreement in the name of Grain Finance with CCC effective July 1, 1969. By virtue

of that agreement, farmers with grain on deposit in the warehouse of Grain Finance could obtain loans from CCC secured by the grain they deposited there.[2] Similar arrangements for FGX were neither sought nor obtained.

By approving the warehouse as a depository, CCC inferentially invited and encouraged farmers in the Evansville area, including the petitioners, to store grain in the warehouse and thereby to obtain loans from CCC when and if they wished to do so. Especially since it was well known that CCC would cause audits to be made of the warehouse consequent to the approval,[3] that invitation

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[2] As noted by the Court of Appeals, CCC, as part of a program to support the prices of agricultural commodities and to control harmful fluctuation in the supply of those commodities, is authorized to give low-interest non-recourse loans to farmers, collateralized by grain deposited by them in CCC-approved warehouses. If the farmer repays the loan and interest, he may reclaim his grain. If he does not repay the debt, CCC takes title to the grain, and the farmer's obligation is completely discharged. Thus, a farmer has the option of selling the grain to CCC for the amount of the loan or, if the market is higher later, of reclaiming it and selling it at the market price. See U. S. Department of Agriculture, "Summary of 30 Years' Operations of the Commodity Credit Corporation, 1964" (May 1965).

[3] 7 C.F.R. § 1421.5554 states: "Except as otherwise provided in this subpart, a warehouse will be examined by a person designated by CCC before it is approved by CCC for the storage or handling of the commodity involved and periodically thereafter to determine its compliance with CCC's standards and requirements." Paragraph 18(c) of the Uniform Grain Storage Agreement provides: "Examinations . . . At any time during business hours the warehouseman shall permit CCC to examine the warehouse and its equipment; inspect, measure, and take inventories of all grain stored therein; and examine the books, records, papers, and accounts relating to the warehouse and to all grain stored therein."

lured farmers to the warehouse and caused them to have dealings with Grain Finance and FGX which they would not otherwise have had. With that invitation, CCC assumed a duty to those to whom the invitation was extended to exercise reasonable care in ascertaining whether the warehouse was and continued to be a safe place in which to store grain, not only from the standpoint of its physical facilities but from the standpoint of the economic stability and integrity of the operator as well, and a duty to warn them if it was not a safe place or if it became a place which was not safe.[4]

After CCC approved the warehouse, petitioners, solicited as they were by advertising that CCC approval had been obtained, did increasing amounts of business with Grain Finance and FGX. They deposited grain in the warehouse, took warehouse receipts, and borrowed money from CCC secured by the grain on deposit. In some instances, they permitted CCC to acquire ownership of the grain on deposit as payment of outstanding loans by CCC. In other instances, they sold the grain, used to collateralize CCC loans, to Grain Finance or FGX pursuant to commitments under price later contracts that

[4] A bulletin of U. S. Department of Agriculture, Agricultural Stabilization and Conservation Service, "ASCS Background Information", BI No. 2, March 1976, states, in referring to Uniform Grain Storage Agreements, "These agreements provide for storage, handling charges, and other requirements needed to keep the inventory safe." Another publication of the U. S. Department of Agriculture, "Summary of 30 Years' Operations of the Commodity Credit Corporation, 1964" (May 1965), states (p. 28): "When farm products go into the price support program—either under non-recourse loans or through Government purchase or takeover—it is vital that they be kept in safe storage until they can be moved into useful consumption."

they would receive at a future date more than they could have obtained for the grain by permitting CCC to acquire ownership of it in payment of CCC loans. They were also persuaded to buy grain from Grain Finance and FGX, purportedly on deposit in the warehouse, or were persuaded to deposit grain in the warehouse, in either case taking warehouse receipts and making the grain purchased or deposited the subject of price later contracts with Grain Finance or FGX.

After July 1, 1969, Green patterned the overall operations of Grain Finance and FGX to adjust to expectable spring and fall audits of Grain Finance by Agricultural Marketing Service. As new grain poured in from the farmers in the fall, that which was to be held on open storage was accepted by Grain Finance, as it had to be in order to permit it to secure CCC loans. Most of the price later contracts were entered into by FGX. Upon receipt by FGX of the grain which was to be the subject of the price later contracts, the grain was assigned on the books to Grain Finance without payment by Grain Finance to FGX, thereby increasing the book assets of Grain Finance without increasing its book liabilities. Additionally, FGX purchased grain which was assigned on the books to Grain Finance without payment.

Following the fall audit, grain was sold to generate funds with which to pay for grain previously purchased, and to a lesser extent to meet price later contract obligations. In advance of the spring audit, grain was purchased, principally by FGX, and again assigned on the books to Grain Finance without payment by it to FGX. The grain on hand was materially depleted following the spring audit by sales to generate funds to pay for grain purchased before the spring audit. In turn, in order

to restore the apparent balance between the grain Grain Finance had on hand and its grain obligations, the grain sold was principally replaced in advance of the fall audit by new grain received from farmers.

The steady rise of the price of grain in the market forced Grain Finance and FGX to pay more for grain they purchased than they had obtained for the grain which the purchased grain was intended to replace. By selling grain which was the subject of price later contracts earlier than the dates on which they were committed to sell it, they diminished their assets more than their liabilities. By entering into agreements with the farmers postponing the dates of sale under existing price later contracts, but increasing the minimum price guaranteed, Grain Finance and FGX increased their liabilities without increasing their assets.

As a consequence, after July 1, 1969 there developed a steadily growing disparity, at times of AMS audits, between the number of bushels of grain Grain Finance had on hand and the number of bushels with respect to which it was obligated, and an even greater disparity at times other than periods of AMS audits, even crediting Grain Finance with grain with respect to which FGX had commitments under price later contracts, but which had been assigned on the books to Grain Finance without payment to FGX by Grain Finance. Even with that credit, the shortage was 78,322 bushels on September 1, 1970. By August 31, 1972, the shortage stood at 313,108 bushels. There developed a still greater disparity between the number of bushels of grain Grain Finance and FGX collectively actually had on hand, and the number of bushels they needed to meet their grain obligations. So also, there developed a steadily growing disparity

between the collective assets of Grain Finance and FGX and their collective liabilities, and Grain Finance and FGX, which had at least serious financial difficulties or were bankrupt on July 1, 1969, plunged deeper and deeper into bankruptcy.

Petitioners continued to do business with Grain Finance and FGX until about November 14, 1974, when a state court receiver was appointed for each of those companies.

After the approval of the warehouse as a depository of CCC grain shortly before July 1, 1969, Agricultural Marketing Service, in cooperation with CCC, conducted audits of Grain Finance on September 2, 1969; May 25, 1970; December 9, 1970; May 26, 1971; October 21, 1971; May 15, 1972; and November 14, 1972.

The twenty-one alleged acts of negligence of the United States by the United States Department of Agriculture and its agencies, principally AMS and CCC, included the following:

1. It failed to ascertain, when it approved the warehouse as a depository for CCC grain, that Grain Finance and FGX had serious financial difficulties or were bankrupt, and that the warehouse was, therefore, not a safe place in which to store grain.
2. It failed to insist that an Application for Approval of Warehouse be filed by FGX as well as Grain Finance, and, in auditing Grain Finance and determining whether the warehouse was a safe place in which to store grain, failed to consider the assets and obligations of FGX.
3. In auditing Grain Finance, it failed to take into account the grain obligations of Grain Finance and FGX with respect to grain which was the subject of price later contracts.

4. It also failed to examine Grain Finance's scale tickets, which would have disclosed that the numbers recorded in Grain Finance's daily position records were in excess of what Grain Finance had on hand.

5. It failed, in other respects, to follow the AMS manual for examinations in auditing the operations of Grain Finance.

6. It failed to ascertain that the warehouse was not a safe place in which to store grain at all times on and after July 1, 1969.

7. It failed to warn petitioners that at all times on and after July 1, 1969, the warehouse was not a safe place in which to store grain.

In November 1972, the United States ascertained that Grain Finance had ceased to maintain daily position records after April 1972. On November 14, 1972, an AMS examination of Grain Finance disclosed a shortage of 12,983 bushels, and, at that time, Grain Finance refused to furnish scale tickets, position records and shipping records until the return of certain of its personnel. Shortly after November 18, 1972, at the request of Grain Finance, the Uniform Grain Storage Agreement between Grain Finance and CCC was terminated.

Beginning no later than November 14, 1972, the United States believed that Grain Finance and FGX were far short of their grain obligations and individually and collectively in desperate financial condition, but intentionally and wrongfully failed to warn the farmers in the Evansville area, including the petitioners, that the warehouse facility utilized by Grain Finance and FGX was not a safe place in which to store grain. It did not give that warning so that the farmers would continue to be

lured to the warehouse facility, and would continue to have dealings with Grain Finance and FGX they would not otherwise have had; so that it could, as it did, in conspiracy with Green, acting for Grain Finance and FGX, convert to its own use grain then in the warehouse and grain thereafter deposited by the farmers, all with a view to covering up its negligence and to recouping its losses at the expense of the farmers.[5]

After November 1972, AMS continued to audit Grain Finance, auditing it on April 25, 1973; August 8, 1973; and August 20, 1974, and doing so negligently.

As a proximate result of the negligence of the United States prior to November 1972 and its intentionally wrongful conduct beginning in November 1972, the petitioners incurred damages of $1,782,754.61.[6]

In the alternative, the complaint sought an accounting by the United States for grain in the common warehouse facility on and after November 14, 1972, which was converted by CCC.

The United States moved to dismiss the complaint not only on the ground that the United States owed no action-

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[5] As alleged, Cast, Chief, Bulk Grain Storage Control Division of the ASCS Commodity Office, wrote to Green on August 9, 1973: "We shall expect you to ship the remaining inventory on hand, that you will also ship the corn being received and shelled until CCC's obligations have been satisfied, and that you will not sell any of the corn being received and shelled in the meantime."

[6] Eldon Ellis, who was among the appellants in the Court of Appeals, has not joined in the filing of this petition.

able duty to petitioners and that petitioners' claim was barred by the misrepresentation or deceit exclusion of the Tort Claims Act, 28 U.S.C. § 2680(h), but also on the ground that the action was barred by the two-year statute of limitations contained in 28 U.S.C. § 2401(b); that the alleged duty was a "discretionary" duty so as to exclude a claim predicated upon its breach, pursuant to 28 U.S.C. § 2680(a); and that there was a variance between the amount claimed in the complaint and the amount sought in the claim filed in the United States Department of Agriculture. The Court of Appeals rejected the statute of limitations and variance as grounds for dismissal, and did not pass upon the "discretionary" duty issue.

REASONS FOR GRANTING THE WRIT

It has been eighteen years since this Court held in *United States* v. *Neustadt*, 366 U.S. 696, in the context of an FHA appraisal, that negligent misrepresentations are within the "misrepresentation" exclusion of the Federal Tort Claims Act, 28 U.S.C. § 2680(h). Since then, the lower courts have struggled to apply *Neustadt* to cases involving negligent failures to warn, and have applied it with conflicting analyses and results.

In *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (9 Cir., 1964), *cert. dism.*, 379 U.S. 951, a case involving an airplane crash and alleged negligent traffic control, the Court held, distinguishing *Neustadt*, that the gravamen of the action was not misrepresentation but "the negligent performance of operational tasks" (335 F.2d 398). The Court did not define the term "operational tasks", but it is readily apparent that any governmental function regularly performed, including audits by Agricultural

Marketing Service, could be characterized as "operational", and that any failure to warn in connection with those operational tasks could be deemed not to be within the "misrepresentation" exclusion. We believe that whether the injury results from an "operational" task is relevant to whether the duty was a discretionary one within Section 2680(a), see *Dalehite* v. *United States*, 346 U.S. 15, 42, but is irrelevant to whether the claim is excluded by 2680(h). A better analysis would have been that the case simply did not involve the kind of negligent misrepresentation in a commercial setting, which should be considered a tort because it can fairly be said that a negligent misrepresentation in that setting should entitle the injured party to the same relief as a fraudulent one.

To the same effect, *Betesh* v. *United States*, 400 F.Supp. 238, 241 (D.C. D.C., 1974) (failure of physicians conducting a preinduction physical examination to inform decedent of an abnormal X ray).

In *Ingham* v. *Eastern Air Lines, Inc.*, 373 F.2d 227 (2 Cir., 1967), *cert. den.*, 389 U.S. 931, another case involving an airplane crash and alleged negligent traffic control, the Court stated that the gravamen of the complaint was the negligent performance of operational tasks, but went on to distinguish *Neustadt* on the ground that it involved "business dealings of a financial or commercial character with the government" (373 F.2d 239).[7] The Seventh Circuit in petitioners' case could have distin-

[7] Compare *De Bardeleben Marine Corp.* v. *United States*, 451 F.2d 140 (5 Cir., 1971), holding the claim of a barge owner predicated on the use of a geodetic and coastal chart excluded as a claim of negligent misrepresentation.

guished, but did not distinguish, *Neustadt* on the same ground, to the extent that it viewed petitioners as relying upon an implied representation resulting from a negligent failure to warn, since petitioners' losses were the consequence of their business dealings with Grain Finance and FGX, rather than the government.

In *Ramirez* v. *United States,* 567 F.2d 854, 857 (9 Cir., 1977) (*en banc*), the Court held that the plaintiff who suffered harm from a surgical complication of which the United States failed to warn him was "the victim of negligent conduct, not of an esoteric form of misrepresentation", termed the action one for medical malpractice, rather than for "misrepresentation", and expressly overruled the holding of *Hungerford* v. *United States,* 307 F.2d 99 (9 Cir., 1962),[8] that a communicated diagnosis as to physical condition is a representation, and its reaffirmance in *De Lange* v. *United States,* 372 F.2d 134 (9 Cir., 1967). In effect, the Court declined to torture the action into one involving an implied misrepresentation that the plaintiff's surgery would not have the complication it did. Applying the same reasoning to this case, the Seventh Circuit should have held, but did not hold, that the gravamen of this action is negligence, and should have declined to bring

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(7 Continued)
Plainly, the case did not involve business dealings of a financial or commercial character with the government. We believe that the *Ingham,* not the *De Bardeleben,* analysis is sound; see *United States* v. *Neustadt,* 366 U.S. 711, fn. 26, quoted at page 15 *infra.*

[8] In *Hungerford,* the Court distinguished the duty to provide proper care from the duty to provide a proper diagnosis, and held the former not within the "misrepresentation" exclusion. To the same effect, *Beech* v. *United States,* 345 F.2d 872 (5 Cir., 1965).

this case within the "misrepresentation" exclusion by converting a failure to warn into an implied misrepresentation.

It is obvious, of course, that any failure to warn that conditions are not safe can be construed to carry with it an implied representation that conditions are safe. [The complaint in this case does not, in terms, allege a representation or misrepresentation, expressed or implied.] That being so, the Seventh Circuit's decision that petitioners' claim is excluded from the Federal Tort Claims Act because it is based on an implied representation that the warehouse was a safe place in which to store grain, is antithetical to *Indian Towing Co.* v. *United States,* 350 U.S. 61 (in which the "misrepresentation" exclusion was not discussed), and to this Court's comment in *United States* v. *Neustadt,* 366 U.S. 696, 711, footnote 26:

> "Our conclusion neither conflicts with nor impairs the authority of *Indian Towing Co.* v. *United States,* 350 U.S. 61, which held cognizable a Torts Act claim for property damages suffered when a vessel ran aground as a result of the Coast Guard's allegedly negligent failure to maintain the beacon lamp in a lighthouse. Such a claim does not 'arise out of . . . misrepresentation,' any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. As Dean Prosser has observed, many familiar forms of negligent conduct may be said to involve an element of 'misrepresentation,' in the generic sense of that word, but '[s]o far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit,' and has been confined 'very largely to the invasion of interests of a financial or commercial character in the course of business dealings.' Prosser,

Torts, § 85, 'Remedies for Misrepresentation,' at 702-703 (1941 ed.). See also 2 Harper and James, Torts, § 29.13, at 1655 (1956)."

See also, *Wiseman* v. *United States,* 327 F.2d 701 (3 Cir., 1963) (affirming holding that United States negligently failed to warn window washers of dangerous condition of windows, without discussion of 2680(h)).

In *Wenninger* v. *United States,* 234 F.Supp. 499, 505 (D.C. Del., 1964), *aff'd per curiam,* 352 F.2d 523 (3 Cir., 1965), an airplane crash case, the Court stated:

> "A failure to warn of an existing danger, when a duty to do so exists, is in a sense an implicit assertion that there is no danger. For some purposes, at least, this may be properly characterized as a misrepresentation. This is not the type of misrepresentation, however, that § 2680(h) was intended to cover. This is made clear by the comments in *United States v. Newstadt,* 366 U.S. 696, 711, n. 26, 81 S.Ct. 1294, 6 L.Ed.2d 614 (1960)."[9]

[9] Compare *Irick* v. *United States,* slip opinion (4 Cir., 1976), in which the Court held the negligent failure on inspection to determine that wiring was defective and to warn of the hazard, was within the "misrepresentation" exclusion, when coupled with the approval of the home for the financial assistance program under the Housing and Urban Development Act of 1968. It is difficult to view such an approval as more than an implied misrepresentation. (Note that in the case of these petitioners, the audit followed, rather than preceded, the approval.) Compare also, *Fitch* v. *United States,* 513 F.2d 1013 (6 Cir., 1975), in which the Court held that a claim that the plaintiff had been mistakenly identified with the wrong lottery ticket number for draft purposes was barred by 2680(h). Again, there would appear to have been nothing more involved, apart from negligence, than an implied misrepresentation at best.

Wenninger is plainly contrary to the holding of the Seventh Circuit that the implied misrepresentation that conditions are safe, that follows from a failure to warn they are not, is a "misrepresentation" within § 2680(h).

A punitive implied misrepresentation case should be contrasted with those in which the misrepresentation was explicit and relied upon; see, for example, *Rey* v. *United States,* 484 F.2d 45 (5 Cir., 1973) (USDA falsely represented that hogs had cholera); *Saxton* v. *United States,* 456 F.2d 1105 (8 Cir., 1972) (USDA represented cattle were not diseased, when they were); *Smith* v. *United States,* 333 F.2d 70 (10 Cir., 1964) (Dep't. of Interior misrepresented land to be potentially productive).

This case is important to anyone injured by the negligence of the United States or its intentional failure to warn. Unless this Court undertakes to clarify the law, anyone so injured may lose his rights by a lower court's construing his claim as one of implied misrepresentation.

There is a conflict between the rationale of the Seventh Circuit in this case and that of other circuits in other cases.

We submit that this Court should grant this petition to alleviate the confusion as to the proper application of *Neustadt* and the "misrepresentation" exclusion, and thereby to place itself in a position to hold, as it should, that the tort of negligent misrepresentation applies only to cases where there is an explicit misrepresentation by one party to a commercial transaction to the other and the gravamen of the action is that the plaintiff relied upon the explicit misrepresentation to his detriment.

That the tort of negligent misrepresentation does not encompass cases in which there is no more than an implied misrepresentation from the failure to communicate

is evident from the standard formulations of the tort, *Restatement of Torts 2d*, ch. 22, Topic 3, "Negligent Misrepresentation", § 552 (1977); 1 Harper and James, *Torts* 545-551 (1956); Prosser, *Torts* 704-710 (1971 ed.). Further, we are unable to find any common law case which has extended the tort of negligent misrepresentation to cases involving no representation other than one which can be implied from the failure to warn or otherwise to communicate.

The complaint in this case alleges not merely a negligent failure to warn, but a subsequent intentional failure to warn. The intentional failure to warn cannot be viewed as a "misrepresentation" or a "deceit" within Section 2680(h) for lack of an overt misrepresentation, an overt representation coupled with a concealment that deceives, or a business transaction between the parties from which the injury results, *Restatement of Torts 2d*, ch. 22, Topic 2, "Concealment and Nondisclosure", §§ 550-551 (1977); Prosser, *Torts* 695-699 (1971 ed.); 1 Harper and James, *Torts* 586-590 (1956).

Moreover, to construe the word "deceit" to include the kind of intentional cover-up, without a misrepresentation, which is alleged here to have followed a period of negligence would make a mockery of the Federal Tort Claims Act. It would construe the Act to say that one who is injured by the negligence of the United States may recover as long as the United States is not aware of its own negligence. But if it learns of its negligence and then actively covers up the negligence in order to recoup its losses at the expense of those who have been injured, the recovery of injuries incurred from the inception of the cover-up is barred. To construe the Act that way would encourage governmental employees to compound their negligence with intentional wrongdoing.

We have included in the statement of the questions presented a question as to whether the United States owed petitioners a duty to exercise reasonable care in ascertaining whether the warehouse was a safe place in which to store grain and to warn if it was not. We have done so, even though the Seventh Circuit did not reach that question, because we believe that if this Court grants this petition to consider the application of the "misrepresentation" exclusion, it should decide the duty question as well, not only because that question is an important one, but because consideration of that question by this Court would render it unnecessary in all events to present that question once more to the Seventh Circuit.

The United States did owe a duty to petitioners because the Commodity Credit Corporation lured petitioners to the warehouse by offering them, in aid of the farm price support program, loans on favorable terms, and by insisting, as a condition precedent to obtaining the loans, that petitioners deposit their grain in a CCC-approved warehouse. It would be grossly unfair to hold that Commodity Credit Corporation could lure petitioners to the warehouse and then attempt to protect its own interests in its dealings with the warehouse, by audit, without at the same time having a duty to protect the interests of those whom it lured to the warehouse.

While premises liability cases are not in point, they are analogous; see *Restatement of Torts 2d*, ch. 13, Topic 1, "Liability of Possessors of Land to Persons on the Land", § 344 (1965); Prosser, *Torts* 385 (1971 ed.). That liability applies not only to those who own the premises, but extends to others who invite persons to the premises, *Rouillard* v. *Canadian Klondike Club*, 54 N.E.2d 680, 681 (Mass., 1944); *Eide* v. *Skerbeck*, 242 Wis. 474, 8 N.W.2d

282, 285 (1943); and extends to implied invitations as well as expressed invitations, 62 Am.Jur.2d 281-282, "Premises Liability", § 44; *Evans* v. *Sears, Roebuck and Co.*, 104 S.W.2d 1035, 1038 (Mo., 1937); *Copeland* v. *Larson*, 174 N.W.2d 745 (Wis., 1970). It has been held to give rise to liability under the Federal Tort Claims Act, *United States* v. *White*, 211 F.2d 79 (9 Cir., 1954).

Distinguishable are cases involving audits by governmental agencies of institutions which did not involve the agencies' actively encouraging dealings with those institutions or which involved audits intended to aid the government in its regulation of the institutions, rather than to protect itself; see *Davis* v. *Federal Deposit Insurance Corporation*, 369 F.Supp. 277 (D.C. Colo., 1974); *In re Franklin National Bank Securities Litigation*, 445 F. Supp. 723, 730-731 (D.C. N.Y., 1978); *Davis* v. *United States*, 395 F.Supp. 793 (D.C. Neb., 1975), *aff'd*, 536 F.2d 758 (8 Cir., 1976). The United States Department of Agriculture does not regulate private warehouses.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JULY, 1979

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 78-1873

ROBERT L. PRESTON, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

On Appeal from the United States District Court for the Western District of Wisconsin.
No. 77 C 33—JAMES E. DOYLE, *Judge*.

HEARD JANUARY 19, 1979—DECIDED APRIL 16, 1979

Before SWYGERT and CUMMINGS, *Circuit Judges*, and CROWLEY, *District Judge*.*

CUMMINGS, *Circuit Judge*. Plaintiff Robert L. Preston and 67 other farmers and estates of deceased farmers have sued the United States under the Federal Tort Claims Act (28 U.S.C. § 1346(b)) for damages, claiming

* Honorable John Powers Crowley, district judge of the Northern District of Illinois, is sitting by designation.

that they lost $1,910,057.42[1] in their dealings with Grain Finance Company, Inc. (Grain Finance) and Farmers Grain Exchange, Inc. (FGX) by reason of negligent and wrongful actions of the United States Department of Agriculture, the Agricultural Marketing Service (AMS) and Commodity Credit Corporation (CCC). As an alternative to damages, plaintiffs sought an accounting.

Defendant filed a motion to dismiss. The following allegations of the complaint must be taken as true for purposes of ruling on that motion: In 1957 Benjamin T. Green secured a Wisconsin license for Grain Finance to operate a public warehouse in Evansville, Wisconsin, and in December 1965, he secured a similar license for FGX to operate a public warehouse at the same location as the Grain Finance warehouse. Green thereafter stored grain for farmers in the Evansville area at that warehouse and issued warehouse receipts in the names of Grain Finance and FGX, commingling all the grain stored by Grain Finance with all the grain stored by FGX.

Beginning in late 1959, the CCC approved the Evansville warehouse facility as a depository for CCC-owned grain. In July 1969, Green obtained CCC approval of the Evansville warehouse not only as a depository for CCC-owned grain but also as a depository for grain acquired in the warehouse by CCC as a result of its loans to farmers. Simultaneously Green and CCC entered into a Uniform Grain Storage Agreement. By virtue of that agreement, farmers with grain on deposit in the Evansville warehouse facility could obtain loans

[1] There were originally 68 plaintiffs but two did not appeal, thus reducing the *ad damnum* to $1,788,902.28.

from CCC secured by the grain they deposited there.[2] CCC regularly causes inspections and audits to be made of CCC-approved warehouses to assure that they are safe places for the storage of grain.

According to the plaintiffs, since in order to obtain the favorable CCC loans they were required to store their grain in an approved warehouse, CCC's approval of Green's warehouse effectively invited and encouraged farmers in the Evansville area to store grain in that facility. Because it was known that CCC would cause audits to be made of Grain Finance, plaintiffs were lured to the Evansville warehouse facility, causing them to have dealings with Grain Finance and FGX. Because of its approval of the warehouse, CCC is said to have assumed a duty to plaintiffs to exercise reasonable care in ascertaining whether that warehouse facility was a safe place in which to store grain from the standpoint not only of physical facilities but also from the standpoint of economic stability and the integrity of the operator. CCC is said to have a duty to warn plaintiffs if the Evansville facility was not a safe place or if it became a place that was not safe.

In cooperation with CCC, AMS conducted audits of Grain Finance in September 1969, May 1970, December 1970, May 1971, October 1971, May 1972, November 1972, April 1973, August 1973 and August 1974. By con-

[2] The CCC, as part of a program to support the prices of agricultural commodities and to control harmful fluctuations in the supply of those commodities, is authorized to give low-interest non-recourse loans to farmers, collateralized by grain deposited by them in CCC-approved warehouses. If the farmer repays the loan and interest he may reclaim his grain. If he does not repay the debt, the CCC takes title to the grain and the farmer's obligation is completely discharged. Thus a farmer has the option of selling the grain to the CCC for the amount of the loan or, if the market is higher later, of reclaiming it and selling it at the market price.

ducting those audits, CCC and AMS assertedly assumed a duty to plaintiffs to exercise reasonable care in ascertaining that said warehouse was and continued to be a safe place in which to store grain and to warn them otherwise.

Because of CCC's approval of this warehouse facility, plaintiffs allege that they did increasing amounts of business with Grain Finance and FGX and borrowed money from CCC secured by their grain on deposit there. They also deposited grain in that facility under a variety of arrangements—including simple bailments and price later contracts (see note 3 *infra*)—which did not involve CCC loans. In November 1972, at Green's request, CCC withdrew its approval of his warehouse so that after that date CCC loans were no longer available for grain stored there. However, AMS continued to audit the facility which still contained grain which was owned by CCC or which was collateral for CCC loans. Plaintiffs continued to do business with Grain Finance and FGX until November 14, 1974, when a state court receiver was appointed for those companies.

According to plaintiffs, when CCC approval was granted to this warehouse facility in July 1969 and when the Uniform Grain Storage Agreement was entered into between Green and the CCC effective that month, Grain Finance and FGX had serious financial difficulties and were bankrupt, so that their warehouse facility was not a safe place in which to store grain.

After July 1969, Grain Finance and FGX assertedly sold some grain which was owned by these farmers or by CCC and covered by warehouse receipts. Plaintiffs also alleged:

> "Some of the grain which they [Grain Finance and FGX] sold, they had no right to sell because, although it was the subject of price later contracts, the sales were not made pursuant to the price later contracts [with plaintiffs], but by way of converting the grain, and the proceeds from the sale of the grain, to their own use" (App. 11).

Green, Grain Finance and FGX after 1969 allegedly used the same grain twice—to represent purchases and obligations of both of the legally separate but physically integrated firms—in order to distort audits of their books. There was a growing disparity between the grain they had on hand and the grain they needed to meet their obligations. FGX filed a bankruptcy petition in September 1974, and Grain Finance did so in February 1975.

Plaintiffs claim they were injured by the following wrongful acts of defendant and its agencies:

1. CCC failed to ascertain that Grain Finance and FGX had serious financial difficulties or were bankrupt when it approved their warehouse facility as a depository.

2. CCC failed to warn plaintiffs that Grain Finance and FGX had serious financial difficulties or were bankrupt at the time CCC approved the warehouse.

3. CCC audits of Grain Finance should have included audits of FGX and should have considered the obligations of both entities with respect to grain which was subject to price later contracts.[3]

4. CCC should have notified plaintiffs of grain shortages found at Grain Finance in November 1972 and of the termination of the Uniform Grain Storage Agreement between Grain Finance and CCC later that month.

5. CCC should have warned plaintiffs of grain shortages discovered at Grain Finance in August 1973.

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[3] Under price later contracts some of the grain deposited by some of the plaintiffs with Grain Finance and FGX was purchased by those companies subject to agreements to pay the market price for it at a future date. An example of such a contract appears at defendant's appendix A4-A5.

6. In November 1972, CCC did not warn plaintiffs of Grain Finance's and FGX's desperate financial condition, so that CCC could convert to its own use grain in the warehouse in which plaintiffs had an interest.

7. After November 1972, CCC converted to its own use grain deposited by plaintiffs in the Evansville warehouse.

8. Because of CCC's negligence before November 1972 and its intentionally wrongful conduct after November 1972, plaintiffs continued to store grain at the Evansville warehouse facility until a receiver was appointed in November 1974.

The complaint next asserted that plaintiffs and CCC owned all the grain deposited in the Evansville warehouse on November 14, 1972. From November 1972 until November 1974, CCC had Grain Finance ship grain to CCC even though most of the grain had been deposited there by plaintiffs, much of it after the termination of the Uniform Grain Storage Agreement.

The complaint closed with a statement that plaintiffs did not learn that this warehouse was not a safe place in which to store grain until November 14, 1974. Therefore, in June and August 1976, plaintiffs filed damage claims with the Department of Agriculture, which denied them in December 1976.

Fourteen months after the complaint was filed, defendant filed a motion to dismiss, asserting that (1) the action was barred by the two-year statute of limitations contained in 28 U.S.C. § 2401(b), (2) there was no actionable duty on the part of the United States to the plaintiffs, (3) the discretionary function exception of the Federal Tort Claims Act (28 U.S.C. § 2680(a)) was applicable, (4) the misrepresentation or deceit exception of the Tort Claims Act (28 U.S.C. § 2680(h)) was applicable, and (5) the plaintiffs did not have title to the property as required by the applicable regulation contained in 28 C.F.R. § 14.3[4] Finally, according to the motion to dismiss, the district court had no jurisdiction over the claims of 43 plaintiffs since the damages they sought in the complaint exceeded the amount of their administrative claims.[5]

Fourteen months later, the district court filed an opinion and order granting the Government's motion to dismiss the suit. Judge Doyle concluded that on analysis the complaint was essentially an action for misrepresentation or deception and therefore within the following exception contained in the Tort Claims Act (28 U.S.C. § 2680(h)):

> "Any claim arising out of • • • misrepresentation [or] deceit • • •."

He aso held that a defendant inviter has no duty to invitees with respect to "economic losses sustained by persons who deposit their tangible goods, such as grain, in a physical facility, such as a warehouse" (App. 52).[6] The court made no ruling with respect to plaintiffs' claim of conversion of their grain. We affirm except with respect to conversion.

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[4] While the Tort Claims Act permits "claimants" to sue the Government, it also requires such claims to be presented first to a federal agency. 28 U.S.C. § 2675(a) and (b). Applicable regulations provide that administrative claims for injury to or loss of property are to be filed by "the owner of the property, his duly authorized agent or legal representative" (28 C.F.R. § 14.3).

[5] This last defense was supported by the U.S. Attorney's affidavit showing that 43 named plaintiffs had filed lesser administrative claims than the damages they sought in the district court complaint.

[6] Judge Doyle added that "the allegations of the complaint fail to place the defendant, with respect to the warehouses, in the position of an inviter with respect to a physical facility to which an invitee has been invited and upon or within which the invitee has suffered physical injury" (App. 52).

The Misrepresentation or Deceit Exception in the Federal Tort Claims Act Bars Part of the Complaint.

As already noted, the Federal Tort Claims Act excepts from Government liability "any claim arising out of • • • misrepresentation [or] deceit • • •" (28 U.S.C. § 2680(h)). The district court relied exclusively on this exception in dismissing this action. Under *United States v. Neustadt,* 366 U.S. 696, this decision was correct insofar as the complaint relies upon the CCC's breach of any duty supposedly owed by the Government to plaintiffs. In *Neustadt* the purchasers of residential property were furnished a statement reporting the results of an inaccurate Federal Housing Administration inspection and appraisal and, relying thereon, were induced by the sellers to pay a purchase price in excess of the property's fair market value. As here, the Neustadts complained of defendant's negligence and alleged that the Government owed a duty to them and negligently performed that duty, thus entitling plaintiffs to recover. But with only Justice Douglas dissenting,[7] the Supreme Court held that

> "the [Government's] duty to use due care in obtaining and communicating information upon which that party may reasonably be expected to rely in the conduct of his economic affairs, is only to state the traditional and commonly understood legal definition of the tort of 'negligent misrepresentation'" (366 U.S. at 706).

Therefore the lawsuit fell within the misrepresentation exception in Section 2680(h), 366 U.S. at 706-707. The Court specifically held that both negligent and wilful misrepresentations come within the exception. *Id.* at 702. Furthermore, the Court concluded that Congress intended the misrepresentation exception to the Tort Claims Act to apply even where the Government owed claimants a specific duty to make and communicate accurate information to them. Indeed the *Neustadt* Court did not confine its holding to the Federal Housing Administration situation involved but ruled that the misrepresentation exception applies to

> "numerous instances in which Congress has relegated to a governmental agency the duty either to disclose directly, or to require private persons to disclose, information for the assistance and guidance of other persons in the conduct of their economic and commercial affairs" (366 U.S. at 710).

[7] Justice Douglas dissented without opinion (366 U.S. at 711). Justice Stewart did not participate.

In addition to *Neustadt,* this case is controlled by our decision in *Redmond v. United States,* 518 F.2d 811 (7th Cir. 1975), where Redmond sought $8,000,000 from the United States on the ground that its employees breached their duty to warn him that he was in imminent danger of becoming a financial victim of one Edward Wuensche's criminal propensities. Applying *Neustadt,* we held this wrong to be nonactionable by virtue of the misrepresentation exception of Section 2680(h). Although the *Redmond* Court also stated that how best to fulfill a government duty is wholly within the discretion of its officers, thus triggering the discretionary function exception of the Tort Claims Act (28 U.S.C. § 2680(a)),[8] we need not consider that exception in view of the applicability of the misrepresentation or deceit exception.

To avoid *Neustadt,* plaintiffs rely primarily on *Indian Towing Company v. United States,* 350 U.S. 61, but that case did not involve the misrepresentation or deceit exception of the Tort Claims Act, and therefore was distinguished in *Neustadt.* 366 U.S. at 711. The *Indian Towing* case involved property damages suffered when a vessel ran aground because of the Coast Guard's negligent failure to maintain a light in the lighthouse it operated or to warn that the light was out. Plaintiffs seek to bring their case within the *Indian Towing* doctrine by character-

[8] 518 F.2d at 816-817.

izing it as not an action for misrepresentation but for negligent operations (here negligently performed audits) coupled with a negligent or intentional failure to warn.

It is not unusual for these and other plaintiffs to describe their cause of action in a way calculated to avoid the misrepresentation exception, but the courts have consistently looked behind the plaintiff's characterization. *Redmond, supra,* at 814; *Fitch v. United States,* 513 F.2d 1013, 1015 (6th Cir. 1975); *Hall v. United States,* 274 F.2d 69, 71 (10th Cir. 1959). On analysis, we think it clear that what plaintiffs are complaining about is an implied misrepresentation. They have alleged that the approval and subsequent auditing of the warehouse by government agencies created an aura that the warehouse was safe, and that they relied to their detriment on this apparent approval by the government agencies. As in *Redmond, supra,* this amounts to an allegation of misrepresentation by implication.

Plaintiffs note in addition that failure to warn in circumstances where the plaintiff alleges reliance on the lack of warning[9] has also been recognized as a form of misrepresentation, but one that does not fall within the exclusion of Section 2680(h). In this regard they rely on *Wenninger v. United States,* 234 F.Supp. 499, 505 (D. Del. 1964), and *Ingham v. Eastern Air Lines, Inc.,* 373 F.2d 227 (2d Cir. 1967), certiorari denied, 389 U.S. 931. Plaintiffs' attempt to analogize their case to those cited is misleading, however, since the failure to warn was not the only misrepresentation involved in this case. The failure to warn cases relied upon by plaintiffs fall within

[9] Defendant has, as noted, asserted that it had no duty to the plaintiffs, relying on *Clemente v. United States,* 567 F.2d 1140 (1st Cir. 1977), certiorari denied, 435 U.S. 1006. We do not reach the issue of whether defendant owed a duty to the plaintiffs since we hold that even if it did, this action cannot be wholly maintained because of the misrepresentation exclusion.

that category of cases, like *Indian Towing,* about which the Supreme Court made the following comment:

> "Such a claim does not 'arise out of • • • misrepresentation,' any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. As Dean Prosser has observed, many familiar forms of negligent conduct may be said to involve an element of 'misrepresentation,' in the generic sense of that word, but '[s]o far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit,' and has been confined 'very largely to the invasion of interests of a financial or commercial character, in the course of business dealings.'" 366 U.S. at 711, n. 26.

Just as some causes of action founded on a traditional negligence theory will also involve an element of misrepresentation, it is equally clear that an action based on negligent misrepresentation may involve underlying negligent conduct which gave rise to the misrepresentation. In *Neustadt,* it was a negligent inspection which caused the misleading appraisal. In the present case, there allegedly were negligent audits which caused the misleading aura of safety.

It is therefore necessary to distinguish those causes of action for independent torts that only collaterally involve misrepresentations from those, like the present one, which are fundamentally grounded on the common law tort of misrepresentation. In making these determinations, the courts have followed *Neustadt's* distinction between personal injury or property damages arising from negligent performance of operational tasks on the one hand and injury resulting from commercial decisions taken in reliance on governmental misrepresentation on the other. In the former category are the cases dealing with plane crashes caused by negligent performance of air traffic

control tasks. *Wenninger v. United States, supra; Ingham v. Eastern Air Lines, Inc., supra; Dickens v. United States,* 545 F.2d 886 (5th Cir. 1977); *Yates v. United States,* 497 F.2d 878 (10th Cir. 1974); *Hartz v. United States,* 387 F.2d 870 (5th Cir. 1968). In those cases the only "misrepresentation" was the failure to warn and this was—as it was in *Indian Towing*—only collateral to the independent tort that caused the physical damage.

In the present case the alleged tort was the implied misrepresentation that the warehouse was safe. In similar cases of injury resulting from reliance on governmental evaluations, the courts have consistently and correctly applied *Neustadt* to hold that the misrepresentation exclusion applies. *Irick v. United States,* ..... F.2d ..... (No. 75-1824, 4th Cir. March 2, 1976); *Scanwell Laboratories v. Thomas,* 521 F.2d 941 (D.C. Cir. 1975); *Fitch v. United States,* 513 F.2d 1017 (6th Cir. 1975) and cases cited at 1016, n. 2; *Summers v. United States,* 510 F.2d 223 (8th Cir. 1975); *Moon v. Takisaki,* 501 F.2d 389 (9th Cir. 1974); *United States v. Longo,* 464 F.2d 913 (8th Cir. 1972); *Thompson v. United States,* 408 F.2d 1075 (8th Cir. 1969); *Smith v. United States,* 333 F.2d 70 (10th Cir. 1964). The test is not whether the injury was economic, but whether it resulted from a commercial decision based on a governmental misrepresentation. Thus in *Irick v. United States, supra,* the plaintiff bought a home subsidized by the Department of Housing and Urban Development (HUD). It was HUD's practice to inspect the homes involved in the subsidy program and plaintiff allegedly relied on this practice as an implied representation that the house was safe. The house burned down due to faulty wiring which a non-negligent inspection allegedly would have revealed, causing the death of plaintiff's two daughters. His wrongful death action was dismissed on the basis of *Neustadt.*

A recent Ninth Circuit *en banc* decision overruling earlier cases which had held mis-diagnosis of medical conditions to be within the misrepresentation exception is consistent with the distinction made in *Neustadt* and

followed in the previously cited cases. In *Ramirez v. United States,* 567 F.2d 854 (9th Cir. 1977) (*en banc*), the court held that failure to obtain informed consent to a surgical procedure was actionable under the Federal Tort Claims Act even though it was predicated on a misrepresentation of the risks involved. The decision was based on the dual grounds that failure to obtain informed consent constituted the independent tort of medical malpractice and that the decision to undergo surgery was not a commercial one. Although relied upon by plaintiffs, *Ramirez* is consistent with our disposition of their case. Theirs was a commercial decision and there is no suggestion that apart from the implied misrepresentation the allegedly negligent audits would have constituted a tort.[10]

Since the gravamen of the complaint is an implied misrepresentation which was relied upon in making a business decision, Judge Doyle correctly concluded that the misrepresentation or deceit exception applied.[11]

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[10] Our own research revealed the additional case of *Matthews v. United States,* 456 F.2d 395 (5th Cir. 1972), in which a claim based on misinformation furnished by members of the Air Force legal staff caused a personal injury plaintiff to forfeit a cause of action through noncompliance with the statute of limitations. The Fifth Circuit reversed the district court's dismissal of the tort claim, remanding for development of whether the plaintiff had stated a claim for legal malpractice. Since malpractice is a tort independent of common law misrepresentation and since the plaintiff was not complaining about having based a business decision on the wrong advice, *Matthews* is not inconsistent with *Neustadt* or our decision in this case.

[11] Because of the applicability of the misrepresentation or deceit exception, plaintiffs' state court cases with respect to landowners' duty to protect invitees from physical injuries are useless. As the district court observed, they do not apply to economic injuries anyway (App. 52).

Defendant's Liability for Conversion

The alternative theory of the complaint is that the Government converted plaintiffs' grain by directing Green to ship grain held in the Evansville warehouse until CCC's obligations were satisfied. Grain thus shipped to the CCC included plaintiffs' grain, some of which was deposited in the warehouse after the CCC had withdrawn its approval. This grain allegedly was taken by the CCC "with a view to recoup [the CCC's] losses at the expense of" plaintiffs (App. 19). The conversion allegedly took place between November 1972 and November 1974. The district court did not discuss defendant's alleged conversion in its opinion dismissing the complaint. If the CCC did convert grain belonging to plaintiffs, they are of course entitled to damages under the Tort Claims Act.

Defendant asserts that plaintiffs cannot recover for conversion because under the price later contracts involving some of the plaintiffs (n. 3 *supra*), they lacked sufficient title to prevail. However, this record does not show which plaintiffs, if any, lacked sufficient title to prevail on their conversion theory.[12] Also, some plaintiffs apparently had grain stored at the warehouse pursuant to two different kinds of contract—price later contracts and simple bailment contracts. Even if they lack sufficient title to prevail on a conversion theory for the grain subject to the price later contracts, they are entitled to a recovery for any bailed grain that was converted. While defendant asserts that the two-year statute of limitations contained in 28 U.S.C. § 2401(b) bars recovery, that provision bars tort claims against the United States unless they are "presented in writing to the appropriate Federal agency within two years after such claim accrues." The complaint alleges that plaintiffs were first aware that this warehouse facility was not a safe place to store grain "shortly before November 14, 1974" (App. 43). All but 12 plaintiffs filed the requisite claims with the Department of Agriculture on June 9, 1976, and the remaining 12 filed their administrative claims on August 6, 1976. Taking these allegations as true, all claims were presented in writing to the Government within two years after their accrual, so that the two-year statute of limitations contained in 28 U.S.C. § 2401(b) does not bar this action. Of course, on remand, the defendant may be able to show that plaintiffs or some of them knew (or should have known) of the conversion more than two years before they filed their claims with the Department of Agriculture and that at least some of them lacked sufficient title to prevail in a conversion action.

[12] The defendant submitted a decision by a bankruptcy judge in which he held that farmers with grain subject to price later contracts did not have title, so that they were not entitled to share in the proceeds resulting from the sale of the grain by the trustee. This decision, of course, is not determinative of whether they could prevail on a common law conversion theory. On reconsideration, the bankruptcy judge reaffirmed his earlier decision but noted that he had not considered or dealt with "the rights the producers may have against other parties" (Defendant's App. A11).

Finally, the defendant points out that the amounts now claimed as damages by some of the plaintiffs exceed the amounts claimed in their administrative action. This will not bar their suit since their complaint clearly indicates that the administrative claims were for the same damage alleged here (App. 23). However, if the trier of fact concludes that plaintiffs are entitled to recover, the discrepancy in amounts claimed can be taken into consideration.

Affirmed in part; reversed and remanded in part for further proceedings consistent herewith.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
For The Western District of Wisconsin
77-C-33

ROBERT L. PRESTON, MERWIN ABRAHAMSON, ARNOLD B. ANDERSON, EARL W. ANDERSON, as Personal Representative of the Estate of Mary Anderson, deceased, ROBERT ANTES, ARDLIN FARMS, INC., DAVID BLACK, KENNETH BOHNHOFF, JOSEPH BORDERS, ELMER BRAUN, RODNEY BRICKSON, ROBERT F. BRUNSELL, WILBERT CHRISTEN, JR., DENNIS COLLINS, DONALD COLLINS, DOROTHY COLLINS, RUSSELL COUSIN, DOUGLAS CULLEN, KENNETH DIEHLS, CECILE L. DISCH, Individually and as Surviving Joint Tenant with Henry C. Disch, deceased; ROGER EICHER, ELDON ELLIS, CLIFTON ELMER, CLIFFORD R. FELLOWS, ALVIN FRANCIS, EDWIN GRETEBECK, ALICE HAAKENSON, CHESTER HAAKENSON, MORRIS R. HAAKENSON, BURDETTE HAAS, HILMAN HALVERSON, SIGRID HANSEN, as Sole Heir of the Estate of Paul Hansen, deceased, DAVID HARRINGTON, DUANE HELLAND, HARLAN HERMANSON, JOHN HERMANSON, NORMAN JOHNSON, ROBERT E. JORGENSON: VIRGIL KILITZMAN, MALCOM G. KRUCKENBERG, NORMAN KRUMWEIDE, CLARENCE LAIRD, JAMES M. LUNDE, OLAF LUNDE, WILLIS MARTIN, EDWARD J. MARTY, WILLIAM J. MULLIGAN, JAMES MURRAY, RICHARD NELSON, CLARENCE OSTRANDER, SPENCER PORTER, PHILIP PORTERFIELD, GARY W. PRESTON, ORPHA P. PRICE, ROBERT RITTER, DONALD A. ROBB, DAVE ROWLEY, J. MARTY ROWLEY, ARNOLD RUPNOW, RICHARD SCHNEIDER, ALAN SORENSON, JACK STRICKLAND, KENNETH P. TEMPLETON, JAMES L. THOMPSON, OYVIND J. WIKUM, HAROLD WYRICK, LETHA B. ZEE, as personal Representative

of the Estate of Paul R. Zee, deceased, EDWIN ZEICH, as Administrator of the Estate of Richard Schultz, deceased, FREDERICK ZURFLUH, JOHN ZURFLUH, and WILLIAM ZURFLUH,

Plaintiffs,

v.

Defendant.

UNITED STATES OF AMERICA,

OPINION AND ORDER

This is an action for damages or, in the alternative, for an accounting, purporting to be based upon the Federal Tort Claims Act, 28 U.S.C. §1346(b), and invoking jurisdiction said to have been conferred by the Tort Claims Act.

Defendant has moved to dismiss on several grounds one of which is that the complaint fails to state a claim upon which relief can be granted.

Construing the complaint most favorably to the plaintiffs, it alleges in essence that during a certain period of time the defendant, through its agents: negligently failed to ascertain that two private corporations engaged in warehousing grain were in serious financial difficulties; approved the application of one of said corporations as a depository for grain owned by the Commodity Credit Corporation and grain acquired in the warehouse by the Commodity Credit Corporation; negligently failed to warn the plaintiffs that the two private corporations had serious financial difficulties and that the warehouse facility operated by them was in a safe place for the storage of plaintiffs' grain; neglected to investigate continuously the financial affairs of the two private corporations; failed to warn the plaintiffs over a period of time of information which the defendant's agents did obtain and which would have alerted the plaintiffs to danger; and, after a certain point in time, intentionally deceived plaintiffs with respect to the state of affairs involving the two private corporations.

Defendant's principal contentions are that the United States owed plaintiffs no duty which could have been breached by its negligence, if any, and that, with respect to the alleged intentional conduct by the defendant, the claim is a claim for misrepresentation or deception, which is explicitly excepted from the Federal Tort Claims Act by 28 U.S.C. §2680(h).

With respect to the alleged intentional conduct by the defendant, plaintiffs' attempts to characterize the asserted action as something other than an action for misrepresentation or deception are unpersuasive.

With respect to the remainder of the complaint, plaintiffs contend that defendant's duty to the plaintiffs in the circumstances described in the complaint arises from the law of Wisconsin with respect to the duty of an inviter to invitees who enter upon physical premises. The body of law to which plaintiffs refer concerns physical injuries to persons or property sustained on certain lands or in certain buildings to which the injured parties have been invited. I am aware of no authority extending this doctrine to economic losses sustained by persons who deposit their tangible goods, such as grain, in a physical facility, such as a warehouse. Even if this extension of the doctrine were to be considered seriously, the allegations of the complaint fail to place the defendant, with respect to the warehouses, in the position of an inviter with respect to a physical facility to which an invitee has been invited and upon or within which the invitee has suffered physical injury.

It is ordered that the defendant's motion to dismiss the complaint for failure to state a claim upon which relief can be granted is granted.

Entered this 30th day of May, 1978.

BY THE COURT:

/s/ James E. Doyle
District Judge

APPENDIX C

CHAPTER 171—TORT CLAIMS PROCEDURE

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401 (b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

§ 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided,* That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

§ 2673. [Repealed]

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, meas-

ured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

§ 2676. Judgment as bar

The judgment in an action under section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

§ 2677. Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

§ 2678. Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any

employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care,

in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of

the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.